IN THE

Supreme Court of the United States

Term, 194 No 628

JULIA ECKENRODE, Administratrix of the Estate of JOHN HENRY ECKENRODE, Deceased,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN H. HOFFMAN and
RICHTER, LORD & FARAGE,
B. NATHANIEL RICHTER,
510 North American Bldg.,
Philadelphia 7, Pa.,
Counsel for Petitioner.

Martin & Lyle, 817 Weightman Bldg., Phila. 2, Pa.

INDEX

CASES CITED

STATUTES AND AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 194 No.

JULIA ECKENRODE, Administratrix of the Estate of JOHN HENRY ECKENRODE, Deceased,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Julia Eckenrode, Administratrix of the Estate of John Henry Eckenrode, by her attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on December 18, 1947.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 71 F. S. 764 (1947).

The opinion of the United States Circuit Court of Appeals for the Third Circuit is not reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on December 18, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; U. S. C. A., Sec. 347 (a).

QUESTION PRESENTED.

Did not the majority opinion in the Circuit Court of Appeals, 3rd Circuit, err in affirming the action of the District Court in entering judgment N. O. V. for the defendant railroad on the ground that evidence of negligence was lacking, where the jury made specific findings of fact that there was negligence and the majority opinion did not, and could not distinguish LAVENDER v. KURN, 327 U. S. 740 (1946), 66 S. Ct. 740; MYERS v. READING CO., 67 S. Ct. 1334 (1947), 331 U. S. 477; TENNANT v. PEORIA & P. U.

R. CO., 321 U. S. 29, 64 S. Ct. 409 (1944); LILLIE v. THOMPSON, Tr., 68 S. Ct. 140 (1947), and MOSTYN v. DEL., L. & W. R. CO., 160 F. 2d 15 (2 Cir., 1947), cert. den. October 13, 1947, 68 S. Ct. 82, relied upon by the minority opinion which urged reinstatement of the jury verdict for the petitioner.

PROVISION OF CONSTITUTION INVOLVED.

The Seventh Amendment to the Constitution of the United States, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

STATEMENTS OF THE FACTS.

This is an appeal by petitioner from the action of the Circuit Court of Appeals (3 Cir.) in affirming the entry of judgment N. O. V. after verdict for the plaintiff. The action was brought under the Federal Employers' Liability Act for damages resulting from the death of petitioner's husband, John Henry Eckenrode, while in the employ of the defendant.

The evidence supports the following facts or inferences. The deceased was a flagman (13a), sixty-two years of age (133a), and had been in the employ of the defendant railroad for forty-two years prior to the accident (129a). The accident occurred about noon on October 8, 1943 (9a). Near the point of the accident, the main track lay on an up-grade

(15a) toward the west (77a, 79a). A siding, known as the Hastings Fuel Siding, formed a spur to the right, leading also in a westerly direction from the main spur, but on a down-grade (15a, 40a, 59a). As a result, there was a small two or three foot embankment (58a) between the arms of the Y formed by the two tracks, with the main track being above and the spur track being below. The degree of grade going down to Hastings Fuel was less than the degree of up-grade on the main track (24a). Therefore, the intervening bank being only two or three feet high, a man walking along Hastings Fuel can be seen by one looking out of an engine window from the main tracks (47a). Furthermore, the arms of the Y are fairly close, the main track, at the point where the accident occurred, being only seven or eight feet away from the Hastings Fuel tracks (58a).

Four cars, loaded with coal, had been pulled out of Hastings Fuel past the switch point, at the juncture of the Y (11a, 12a). These four cars were then pushed and coupled on to eighteen other cars similarly loaded, which had previously been left on the main track near the junction point (12a). The switching at the junction and the coupling of the cars were performed by the decedent, Eckenrode (61a). The next movement intended was to push the twenty-two cars uphill some two hundred or two hundred fifty feet in order to couple with some additional cars (14a). The engine was on the rear (11a), being of the "pusher" type and usable only for forward movement (112a). It could not go backward. The cars were being pushed by the front of the engine (12a), and the only thing behind the engine was the cabin or caboose (13a). The defendant's fireman, Sunderlin, who was also a qualified engineer, was operating the locomotive, and the "regular" engineer was acting as fireman at the time (100a).

After Eckenrode's coupling operation, Sunderlin began to push the twenty-two cars. This was uphill pushing. However, in spite of his use of the sanding equipment on the engine, the engine would move only six or eight feet, and would then slip (101a). *Each time the engine slipped,*

Sunderlin would shut off the throttle (20a, 103a). The steam being turned off by the closing of the throttle (103a), the result was that the train *stopped* after each skid (97a). With the power shut off, the lap and lead lever naturally would not move.

After the train had moved only about one or one and a half car lengths (118a), Ingoldsby, the acting fireman, and Sunderlin, the acting engineer, both saw Eckenrode, and a brief conversation took place between Eckenrode and Sunderlin (63a, 81a, 106a). The conversation was about getting the train going (106a), but because of Eckenrode's reference to the use of a crow bar, Sunderlin now says that he regarded Eckenrode's statement as a joke (119a). At the time of the conversation, Eckenrode was close to the engine, on the nearby Hastings Fuel track (63a). The train was then moving very slowly or was stopped because Eckenrode "passed" the engine when he talked to Sunderlin (63a, 75a).

Despite Sunderlin's belated interpretation of his conversation with Eckenrode as a joke, Eckenrode obviously was in dead earnest about helping move the train, for he went a few feet to the Hastings Fuel track to scoop up sand with his hands for the purpose of throwing it under the wheels of the train, to supplement the sand falling from the sanders, in an effort to prevent the slipping of the engine. The sand had been previously dropped by the engine's sanders on the Hastings Fuel track after Ingoldsby had hammered the sanders there to clear the clogging (17a, 24a). Eckenrode was seen by McGowan, the middle brakeman (13a), after the conversation (81a, 82a) to "stoop down and pick up something" (82a), which, from finger marks in the sand on the ground (85a), later proved to be the sand. McGowan then saw Eckenrode walk "toward" the engine with his hands in front of him apparently cupped (82a). These movements McGowan was able to see from a distance of some twenty-two cars (79a), or about a thousand feet. *Had Sunderlin looked down from his seat*

alongside the right hand window in the engine cab, he would have been able to see the sand in the decedent's hands.

When Sunderlin last saw Eckenrode prior to the accident, Eckenrode was *not* going straight down the Hastings Fuel tracks, but *he was walking, according to Sunderlin himself, "toward the front of the train."* This fact was corroborated by Ingoldsby's testimony that Eckenrode "*was walking to the front part of the train.*" In other words, as McGowan, the third witness, put it, Eckenrode "bore to the left • • • towards the train" (82a, 83a), "*toward the engine*" (84a), and walked "diagonally" up the embankment (85a).

Sunderlin next saw Eckenrode lying by the side of the engine (107a, 119a) after the train had completed three or four car lengths of the whole movement (117a) or one and a half or two car lengths from the place where Sunderlin had spoken to Eckenrode. On the cylinder head of the engine marks were found which, in view of the injuries to Eckenrode's face and head, indicated that he had been struck by the piston cylinder (48a, 50a) or driving rods (51a) attached to the wheels, presumably when he leaned over to put the sand, which he was carrying, on the tracks. Admittedly, there was nothing to bar Sunderlin's view from the side window of the engine, and had Sunderlin looked, he could have seen Eckenrode (108a), but he did not look out of the side window (107a). As a matter of fact, Sunderlin was in a sitting position while operating the train (102a), and there was evidence that from a sitting position, one could not see out of the front window (45a). Therefore, since admittedly Sunderlin did not look out of the side window and could not see out of the front window, he was actually driving blindly, and the jury could, and did so find. It is a railroad rule that no train movement is made until the engineer knows the whereabouts of everybody in the crew (952, 962).

The jury in answer to interrogatories found (1) that Sunderlin was negligent in not seeing Eckenrode after their conversation; (2) that if a reasonable man in Sunderlin's

position had been watching Eckenrode to the best of his ability, he could have avoided the accident; (3) that Eckenrode was guilty of contributory negligence; and (4) that plaintiff's damages were $20,000.00, diminished by $10,000.00 for contributory negligence (145a, 146a). Accordingly the jury returned a verdict for the plaintiff for $10,000.00 (146a). On motion by the defendant, the trial Court set aside the verdict and judgment for the plaintiff and entered a judgment n. o. v. for the defendant (156a).

The action of the District Court was appealed and the Circuit Court affirmed, *per curiam*, without an opinion. A petition for reargument was granted, after which the Court affirmed the action of the court below, with a vigorous dissenting opinion by Judge O'Connell. This petition for certiorari follows.

SPECIFICATIONS OF ERROR TO BE URGED.

1. In entering judgment for the respondent.

2. In failing to reverse the Trial Court's order granting judgment N. O. V. for the respondent.

REASONS FOR GRANTING OF WRIT.

1. Petitioner's constitutional guarantee of trial by jury has been violated.

2. The decision of the United States Circuit Court of Appeals (3rd Cir.) is in direct conflict with the principle of the decisions of this Court as expressed in LAVENDER v. KURN, 327 U. S. 740 (1946), 66 S. Ct. 740; MYERS v. READING CO., 67 S. Ct. 1334 (1947), 331 U. S. 477; TENNANT v. PEORIA & P. U. R. CO., 321 U. S. 29, 64 S. Ct. 409 (1944); LILLIE v. THOMPSON, TP., 68 S. Ct. 140 (1947); JOHNSON v. U. S., decided Feb. 9, 1948; and MOSTYN v. DEL., L. & W. R. CO., 160 F. 2d 15 (2 Cir., 1947), cert. den. October 13, 1947, 68 S. Ct. 82. The dissenting opinion is correct in finding that the above cited cases are completely indistinguishable from the instant case, and compelling in support of the jury verdict. The majority opinion implicitly ignores those cases, does not attempt to distinguish them, and holds that the jury finding of negligence is "speculative" and, therefore, unwarranted. Cf. LAVENDER v. KURN, supra, to the contrary.

3. Repeated decisions within the last year in this Circuit reveal an irreconcilable conflict and equal division among the six judges of this Circuit as to the tests to be applied in determining the existence of negligence.

CONCLUSION.

The writ should be granted.

Respectfully submitted,

JOHN H. HOFFMAN and
RICHTER, LORD & FARAGE,
By: B. NATHANIEL RICHTER,
Counsel for Petitioner.

BRIEF.

ARGUMENT.

In this case the evidence clearly shows that Sunderlin, who was operating the engine, knew that the deceased was no longer confining himself to the caboose, but was, in fact, participating in completing the shifting move between the four cars which had been pulled out of the Hastings Fuel track and pushed on to the main track. He had had conversation with the deceased which indicated that the deceased was going to take steps in that direction. The deceased was actually seen walking on Hastings Fuel track by the acting engineer, the acting fireman, and the middle brakeman, at a distance of only seven to eight feet away from the engine. *Each* of these three witnesses admitted that when last seen, Eckenrode was *in motion, walking* toward the train (Sunderlin, 107a; Ingoldsby, 64a; McGowan, 83a). In fact, McGowan specifically said that Eckenrode "bore to the left" (82, 83a) and "walked up toward the engine" (84a), "diagonally" up the embankment (88a), with his hands cupped, carrying something to the train, which later turned out to be sand and which the engineer undoubtedly could have seen and identified from his position, had he looked. This evidence was in no wise controverted.

It is not true, as assumed in the District Court, that the train was in motion when Eckenrode bent over to pour the sand on the track. On the contrary, the evidence indicates, and the jury could, and did find, that the train was *stopped* at the time. The evidence was not disputed that from time to time Sunderlin "shut the throttle off" and would "turn off the steam" (103a). The train stopped "after each skid" (97a).

The lap and lead lever which fatally injured the plaintiff's decedent moves only when the throttle is on, as that is the only time when the power is applied. Conversely, the lap and lead lever is motionless when the throttle is shut off. What happened here was that *while the engine was stopped and the lap and lead lever was motionless* Eckenrode, reasonably believing that Sunderlin, in the exercise of due care, would maintain a proper lookout the side window *before* re-applying the power by opening the throttle, bent over to pour the sand on the track during one of these intermissions, when Sunderlin, without looking and without warning to the deceased, opened the throttle and fatally injured him.

The Circuit Court reasoned that Eckenrode's forty years of experience destroyed any duty, which may have existed, to warn him of the intention to put the lap and lead lever in motion again. On the contrary, that very experience justified Eckenrode's assuming that he who operated the engine would, in the exercise of his duty as an engineer, refrain from making any movement without first assuring himself of the safety of his co-workers. In this case, the throttle was admittedly reapplied without a prior observation for the safety of the train crew and others thereabouts.

The Circuit Court said,

> "* * * We see no reason why Sunderlin should have kept watch for Eckenrode, who knew as much about what had happened and what they were trying to make happen as the engineer, himself, did. But, further, even if Sunderlin had operated his throttle by touch and kept his eyes on Eckenrode all of the time, still the latter's conduct gave no indication of danger."

This was clearly erroneous.

The day was clear and dry (19a). Sunderlin conceded that, had he looked, he could have seen Eckenrode (108a). With Eckenrode only a few feet from the engine, the sand in his cupped hands would certainly have been discernible

to Sunderlin. Under the circumstances, anyone in Sunderlin's position would have realized that Eckenrode meant to get very close to the engine and would almost surely do so; for the sand, if it was to be of any aid to the movement of the train, would have to be placed directly on the track. It would not do to fling it from a distance, for it would then scatter in the air and land everywhere but where it would be most needed. The sand would have to be poured out of Eckenrode's hands not more than a few inches away from the track. Having observed Eckenrode's close approach to the engine with sand in his hands, Sunderlin would have been put on notice to use care in the operation of the train. At least, a jury could reasonably so find, as it did in this case.

Nor was the engineer totally devoid of any prior knowledge of the deceased's intention to return to the engine to help move it. Deceased had specifically told the engineer that he was going to do something about moving it. The District Court, in entering the N. O. V., *decided, as a matter of law, that the deceased was just joking.* But, apart from an understandable and natural tendency for anyone in Sunderlin's position to seek to minimize the import of Eckenrode's remark, as a self-defensive measure, it is submitted that it was for the jury, and not the Court, to determine whether what Eckenrode said reasonably should have put him on notice of the decedent's intention to assist, somehow, in the moving of the engine. Sunderlin may have thought Eckenrode was jesting, but obviously he was in deadly earnest about doing something to stop the slipping, or he would not have tried to do what he did.

The jury was asked and answered interrogatories 3 and 4 as follows:

To interrogatory number 3:

"Was Sunderlin negligent in not seeing Eckenrode *after their conversation*?"

Your answer is "Yes."

To interrogatory number 4:

> "Was there anything which a reasonably careful man in Sunderlin's position should have done which would have avoided the accident even if he had been watching Eckenrode to the best of his ability?"
>
> Your answer is "Yes." (Italics ours.)

The jury implicitly found that deceased and Sunderlin were not joking in their conversation. This was, at least, an issue which the jury alone had the right to decide, in determining whether there was a duty on Sunderlin to look out for the deceased after such notice.

The District Court recognized that there was a duty to maintain a proper lookout, but felt that the deceased was not one of the persons in the group to whom such a duty was owed. The District Court said, at 154a,—

> "Whether he could have looked or did look out of the front window as he proceeded—a matter as to which there was a conflict of testimony—is of very little moment in view of the fact that the side window gave him a much better view * * * along the track and, concededly, he did not look out of the side window. The matter of the front window might have been important if the injury had been to a brakeman on the track or on the cars but the question here is negligence with respect to a man walking along at a safe distance beside the engine, with no reason to be on the train or to come close to it. 'Actionable negligence is negligence to the particular person who has been injured * * * *The decisions are substantially unanimous to the effect that it is not sufficient to show that the defendant owed to another person or class of persons a duty which, had it been performed, would have prevented the injury of which complaint is made by the plaintiff,*' American Jurisprudence, Negligence, Paragraph 18." (Italics ours.)

To paraphrase the finding of the court below, it would appear that its position simply was that as to this decedent, there was no duty on the engineer to maintain a lookout ahead while operating the engine, regardless of the fact that he did owe a duty to maintain such lookout ahead for signals from McGowan, the front brakeman. Concededly, had the engineer maintained a lookout, he would have had the decedent within his constant full view (108a).

The Circuit Court originally affirmed, without an opinion, but, having had directed to its attention the obvious and recognizable conflict between that proposition of law and the view taken of the same question of law in the Second Circuit in the case of MOSTYN v. DEL., L. & W. R. CO., 160 F. 2d 15 (2 Cir., 1947), (Opinion by Judge Learned Hand), granted a re-hearing.

In the MOSTYN case, in reviewing the facts and the question of law, the Court said,

> "There was evidence to support a verdict against the railroad for negligence. It was proved that the men in the 'bunk cars' constantly crossed the track, and had to do so, for, as we have said, their only exit was on that side. The infrequency of the track's use was an assurance of safety, and an added ground for caution on those occasions when it was used. *It might have been possible to argue, although the likelihood that men might be crossing the track was ground for raising a duty towards them, Mostyn, who lay asleep beside the track was not within the class to which that duty was owed and could not take advantage of its breach, even though he would have escaped had the duty been performed.* However, Mostyn testified that two of his supervisors had suggested that the men should sleep outside; and hence the duty was not limited to those who were crossing the track. The jury was free to find—indeed could scarcely have avoided finding—that even the most casual lookout would have discovered

Mostyn lying where he was; and his contributory negligence in doing so was of course not a defence * * *." (Italics ours.)

There was as much a duty to look ahead in the instant case for signals from McGowan as there was in the MOSTYN case for the engineer to look ahead on this infrequently used track for persons who might perhaps be coming from the nearby bunk or shanty. Indeed, the chance that someone would go to sleep alongside that track with his leg extended on the track would appear to be far more remote than the probability that the decedent, in the instant case, would conduct himself as he did.

In the majority opinion, the Court below attempts to wave the MOSTYN case aside by making a distinction without a distinction. The learned court suggests that in the MOSTYN case, if the engineer had looked as he was required, he would have discovered the danger, whereas in the instant case, the engineer "did look" and discovered Eckenrode in a safe position. That is an incorrect statement of fact. The engineer did not look at all from the time he first shut off the power until after he had re-applied it. That this is true may be found by reading Judge Kirkpatrick's opinion in the District Court where he said, "* * * concededly, he did not look out the side window."

From the time when Sunderlin last closed the throttle prior to the time of the fatal re-application of the throttle, there was an intervening period within which the lap and lead lever did not move. It is of no moment that Sunderlin *once* saw the deceased in a position of safety. What we are concerned with is what he could and should have seen, had he looked immediately prior* to the fatal re-application of the throttle. Particularly are we concerned with this, in

---

* In footnote 5 of Judge O'Connell's dissenting opinion he said, "I consider it immaterial whether Sunderlin had a duty to observe Eckenrode **continuously.** For purposes of this case, plaintiff need only establish that Sunderlin failed to observe Eckenrode at a time when he had a duty to do so."

view of the comment of the deceased of his intention to assist in getting the train started. This we know. Had he looked, Sunderlin could not help but see the deceased carrying sand to the train.

The question is whether, even after Sunderlin had seen the deceased in a position of safety, there was a continuing, if not continuous, duty of maintaining a lookout before reinstating the power, especially in view of the possibility of serious harm in the light of the size and character of the instrumentality involved in this case.

What is more, as was pointed out by Judge O'Connell in his dissenting opinion, it was for the jury to say whether there was not indeed a duty to "hang out" the window instead of merely looking out the window, although, concededly, either would have revealed the hazard in which the decedent was placed by the restoration of power. The learned trial judge, after pointing out that the decedent's hazard could have been observed had Sunderlin looked out the window, left to the jury the determination of whether or not there was a duty on the part of the engineer to maintain such a lookout. He said, "That is a question for you. I am going to leave that entirely to you * * * I shall leave it to the jury to say whether his failure to look out the side window was or was not negligence."

In this case, a discerning and extremely intelligent jury was given a series of interrogatories (11) which they answered with care and discrimination. They found no violation of the Safety Appliance Law. They found the decedent guilty of contributory negligence. They found the engineer guilty of negligence in not looking out for the decedent—a specific finding of fact! They cut the full loss of damages right in half and awarded the widow $10,000.00. As was pointed out by Judge O'Connell, although the majority would not accept the jury's findings on the existence of negligence in this case, nevertheless, it was willing to, and did accept the jury's finding that there was no violation of the Safety Appliance Law in relation to the sanders. Certainly there is no justification for such inconsistency.

The jury's findings on the existence or non-existence of fault in this case should have been accepted in whole or not at all.

The Court, in affirming the N. O. V., viewed as improper the above action of the trial judge in sending the case to the jury. It then went on to say:

> "The point we are making does not involve assumption of risk. That is out of this law. Nor does it involve contributory negligence. The jury has found that Eckenrode was contributorily negligent. We are not at all sure that that finding could be sustained for it is just as *speculative* as is a negligence charge against the company. What we are talking goes to the very foundation of liability. * * *
>
> "* * * But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test *honestly and not to pretend that there is negligence when it does not exist.* It does not exist in this case." (Italics ours.)

It was the inacceptability of the alleged speculativeness that prevented the Circuit Court from reinstating the verdict for petitioner in this case. But this line of reasoning "flies directly in the face" of the decisions of this Court in a now long line of cases including TENNANT v. PEORIA & P. U. R. CO., 321 U. S. 29, 64 S. Ct. 409 (1944); BAILEY v. CENTRAL VT. RY., 63 S. Ct. 1062, 319 U. S. 350, 87 L. Ed. 1444 (1943); LAVENDER v. KURN, 327 U. S. 740 (1946), 66 S. Ct. 740; MYERS v. READING CO., 67 S. Ct. 1334 (1947), 331 U. S. 477; LILLIE v. THOMPSON, Tr., 68 S. Ct. 140 (1947).

In LAVENDER v. KURN, supra, the Court said:

> "It is no answer to say that the jury's verdict involved *speculation* and *conjecture*. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of

speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Italics ours.)

In BAILEY v. CENTRAL VERMONT RY., supra, the Court said:

"* * * reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries * * * To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In TENNANT v. PEORIA & P. U. R. CO., supra, this Court said:

"In holding that there was no evidence upon which to base the jury's inference as to causation, the Court below emphasized other inferences which are suggested by the conflicting evidence * * * It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-

finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts * * *. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

This Court further went on to say so aptly in that case:

"* * * No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

The same is especially true in the instant case where the evidence in favor of the petitioner is so much more potent.

Although petitioner relied upon all of these cases; and although, obviously, all of the Court below discussed these cases in the conferences prior to the decision, since the dissenting judge mentions them by name and finds them to be "indistinguishable in principle" from the instant case; and although the dissenting opinion also stated, "In view of what I deem the clear mandate of the Supreme Court, as expressed in Lavender v. Kurn, 327 U. S. 645 (1946); Myers v. Reading, 331 U. S. 477 (1947), and Lillie v. Thompson, U. S. (decided November 24, 1947), * * *"; nevertheless, the majority of the Court below made no effort to distinguish them. They did not even honor them by mention, nor, do we submit, did they follow them.

What is the test of negligence and who is to decide its existence? Decades ago, this Court, in JAMISON, et al. v. ENCARNACION, 281 U. S. 635, 50 S. Ct. 440, said:

"The Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings

given to it by courts and within the word as ordinarily used. MILLER v. ROBERTSON, 266 U. S. 243, 248, 250."

The error in the reasoning of the majority of the Court below is that exact error which the judges of the Circuit Court of Appeals for the 8th Circuit in FLEMING v. HUSTED, 164 F. 2d 65 (1947), at page 67, warned against in arriving at the true concept of the meaning of the word "negligence." The Court there said:

"* * * Under the expressions and indications in the recent decisions of the Supreme Court, there is no right on the evidence to regard it as an absolute, which was entitled to be disposed of as a matter of law. See e. g. Bailey v. Central Vermont Ry., 319 U. S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 33, 64 S. Ct. 409, 411, 88 L. Ed. 520; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. Cf. also Chicago & N. W. R. Co. v. Grauel, 8 Cir., 160 F. 2d 820. The earlier cases, such as Delaware, L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 573; Missouri Pac. R. Co. v. Aeby, 275 U. S. 426, 48 S. Ct. 177, 72 L. Ed. 351, and Nelson v. Southern Ry. Co., 246 U. S. 253, 38 S. Ct. 233, 62 L. Ed. 699, upon which the trustees rely, may not be read apart from these later decisions. *Perhaps, also, the concept of negligence in the earlier cases and the court's admeasurement of the duty owed therein can be said to have contained some unconscious or other subtractings, from the interplay of the then-existing doctrine of assumption of risk.*" (Italics ours.)

We submit that the majority below has now repeatedly shown, and in the instant case reiterated, "unconscious or other subtractings, from the interplay of the then-existing doctrine of assumption of risk" in arriving at this "concept of negligence" and the "duties owed therein," contrary to

the Amendment of 1939 which excised assumption of risk *in toto* from the law. Compare its ruling in MYERS v. READING CO., 155 F. 2d 523 (1946), reversed in this Court, supra, and PITT v. P. R. R., 161 F. 2d 733 (1947), where the entire Third Circuit bench of six judges sat and affirmed the decision by the District Court judge in favor of the plaintiff (66 F. Supp. 443) only by an equal division of the Court. Compare also, MEYONBERG v. P. R. R. (3 Cir.) decided December 19, 1947, affirming judgment for plaintiff (Opinion by O'Connell, Jr., dissent by Goodrich, J.).

It is this conflict in the concept of "negligence" within the bench itself in this Circuit which requires clarification and correction by the grant of certiorari here. *The outcome of a case should not depend upon which three of the six judges in this Circuit happen to be sitting.*

The majority opinion as written by the judges who happened to be sitting in this case followed with amazing similarity of reasoning and expression the language of the dissenting opinion in JOHNSON v. U. S., decided in this Court February 9, 1948, contrary to what this Court has now once again reaffirmed to be the true precept which should be followed in this type of case, as expressed in the majority opinion in that case. Only certiorari can correct what we submit was clear error in this matter now before the Court.

The Second Circuit in the MOSTYN case, supra; found no such difficulty in a much closer case. A judge of the Court below, felt himself obligated to follow the mandate of this Court in its recent decisions on this question of law.

The majority in the Court below either has not recognized the long and universally accepted meaning of "negligence" in these cases or has declined to follow them. It refused to give the Federal Employers' Liability Act, 45 U. S. C. A. 51, et seq., the liberal interpretation Congress intended.

The petition for certiorari should be granted.

Respectfully submitted,

JOHN H. HOFFMAN and
RICHTER, LORD & FARAGE,
By: B. NATHANIEL RICHTER,
Counsel for Petitioner.